



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92122; File No. SR-NYSEAMER-2021-30]

### **Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify the NYSE American Options Fee Schedule**

June 7, 2021.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on June 2, 2021, NYSE American LLC (“NYSE American” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to modify the NYSE American Options Fee Schedule (“Fee Schedule”) regarding the charges applicable to Manual transactions by NYSE American Options Market Makers, Specialists, and e-Specialists. The Exchange proposes to implement the fee change effective June 2, 2021.<sup>4</sup> The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> The Exchange originally filed to amend the Fee Schedule on May 3, 2021 (SR-NYSEAmer-2021-25), then withdrew and refiled on May 12, 2021 (SR-NYSEAmer-2021-27) and May 21, 2021 (SR-NYSEAmer-2021-28), which latter filing the Exchange withdrew on June 2, 2021.

## II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

### A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

The purpose of this filing is to modify Section I.A. of the Fee Schedule regarding the charges for Manual transactions by NYSE American Options Market Makers, Specialists, and e-Specialists. Currently, NYSE American Options Market Makers (“Market Makers”) are charged \$0.25 per contract for Manual transactions; Specialists and e-Specialists (collectively, “Specialists”) are charged \$0.18 per contract for Manual transactions. The Exchange proposes to modify the rates charged for Manual transactions to \$0.35 per contract for Market Makers and \$0.30 per contract for Specialists. The proposed rate for Market Makers is competitive and intended to align the Exchange’s fees for Manual transactions by Market Makers with those charged by other markets.<sup>5</sup> The proposed rate for Specialists would reduce the existing disparity between rates charged to Specialists and Market Makers from seven cents (\$0.07) to five (\$0.05), which disparity the Exchange believes continues to be justified given the additional fees imposed on Specialists.<sup>6</sup>

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<sup>5</sup> See, e.g., Nasdaq PHLX LLC (“Phlx”) Pricing Schedule, available at:

<sup>6</sup> See Fee Schedule, Section III.C. (setting forth the Rights Fee assessed on each issue in a Specialist’s allocation, with rates based on the Average National Daily Customer

The Exchange also proposes to modify Footnote 6 to Section 1.A. of the Fee Schedule, which provides that participants in the Prepayment Program<sup>7</sup> will pay reduced rates for Manual transactions. Specifically, the Exchange proposes to modify Footnote 6 to clarify that Market Makers and Specialists who participate in the Prepayment Program will receive a per contract discount on Manual transactions, instead of setting forth a specific per contract charge. Currently, Footnote 6 provides that Market Makers who participate in the Prepayment Program are charged \$0.23 per contract for Manual transactions (representing a \$0.02 discount on the current \$0.25 per contract rate applicable to Market Makers), and Specialists who participate in the Prepayment Program are charged \$0.17 per contract for Manual transactions (which represents a \$0.01 discount on the current \$0.18 per contract rate applicable to Specialists). The Exchange proposes to revise this footnote to specify that Market Makers that participate in the Prepayment Program will receive a \$0.02 discount on the per contract rate for Manual transactions, and Specialists that participate in the Prepayment Program will receive a \$0.01 discount on the per contract rate for Manual transactions.<sup>8</sup> The Exchange proposes this modification to the Fee Schedule to clarify the nature of the discount available to Market Makers and Specialists who participate in the Prepayment Program and to simplify the Fee Schedule in the event of any future changes to the rates applicable to Manual transactions by Market Makers and/or Specialists.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of

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Contracts).

<sup>7</sup> See Fee Schedule, Section I.D.

<sup>8</sup> Based on the proposed \$0.35 and \$0.30 per contract rates for Market Maker and Specialist Manual transactions, respectively, Market Makers who participate in the Prepayment Program would, as proposed, receive a discounted rate of \$0.33 per contract on Manual transactions, and Specialists who participate in the Prepayment Program would receive a discounted rate of \$0.29 per contract on Manual transactions.

the Act,<sup>9</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>10</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

#### The Proposed Rule Change is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>11</sup>

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.<sup>12</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in March 2021, the Exchange had less than 10% market share of executed volume of multiply-listed equity and ETF options trades.<sup>13</sup>

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>11</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) (“Reg NMS Adopting Release”).

<sup>12</sup> The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: <https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics>.

<sup>13</sup> Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, see *id.*, the Exchange’s market share in multiply-listed equity and ETF options increased slightly from 7.89% for the month of March

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, changes to exchange transaction fees and rebates can have a direct effect on the ability of an exchange to compete for order flow.

The proposed rule change is designed to bring the Exchange's fees for Market Maker Manual transactions into alignment with those charged on other markets with Trading Floors. The Exchange believes it is reasonable to increase certain fees, similar to fees assessed by competing options exchanges for similar transactions, and notes that Specialists will continue to be charged lower fees than those assessed by competing options exchanges for similar transactions.<sup>14</sup> The Exchange also believes that it is reasonable to continue to offer Specialists lower fees than Market Makers for Manual transactions given that Specialists are subject to additional monthly Rights Fees.<sup>15</sup> The Exchange believes that the proposed increased charge for Manual executions by Market Makers and Specialists but not for other market participants is reasonable because the resulting disparity would align the Exchange's fees for Manual executions with the fees charged on other exchanges.<sup>16</sup>

The Exchange also believes the proposed changes, even though they are increased fees, would not discourage Market Makers and Specialists from continuing to conduct Manual

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2020 to 8.63% for the month of March 2021.

<sup>14</sup> See supra note 5.

<sup>15</sup> See supra note 6.

<sup>16</sup> The Exchange does not impose any fee on Manual transactions by Customers but does charge \$0.25 per contract for Manual transactions by Firms, Broker-Dealers and Professional Customers, which rates are consistent with fees charged these market participants on other exchanges. See, e.g., supra note 5, PHLX Pricing Schedule and Cboe Fee Schedule (both exchanges imposing no charge for manual transactions by customers and imposing a \$0.25 per contract rate for manual transactions by firms, broker-dealers and professional customers).

transactions on the Exchange, including because Market Makers and Specialists who participate in the Prepayment Program will continue to receive discounted rates on Manual transactions and because Specialists will continue to be charged lower fees than those assessed by competing options exchanges for similar transactions. And, for Market Makers and Specialists that do not participate in the Prepayment Program, the Exchange believes that other reduced pricing and incentives offer by the Exchange would continue to encourage these participants to conduct Manual transactions on the Exchange.<sup>17</sup>

The Exchange thus believes that the proposed changes would continue to attract volume and liquidity to the Exchange generally and would therefore benefit all market participants (including those that do not participate in Manual transactions) through increased opportunities to trade.

Finally, to the extent the proposed fees do not discourage Market Makers and Specialists from continuing to conduct Manual transactions on the Exchange, the Exchange believes the proposed changes would continue to improve the Exchange's overall competitiveness and strengthen its market quality for all market participants. In the backdrop of the competitive environment in which the Exchange operates, the proposed rule change is a reasonable attempt by the Exchange to maintain its market share relative to its competitors.

#### The Proposed Rule Change is an Equitable Allocation of Fees and Rebates

The Exchange believes the proposed rule change is an equitable allocation of its fees and

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<sup>17</sup> See Fee Schedule, Section III.A (regarding ATP fees for Floor Market Makers); see also, e.g., Notice of Filing and Immediate Effectiveness of Proposed Change to Amend the NYSE American Options Fee Schedule, Securities Exchange Act Release No. 90193 (October 15, 2020), 85 FR 67069 (October 21, 2020) (SR-NYSEAMER-2020-76) (reducing the cap on strategy executions from \$1,000 to \$200 for ATP Holders that execute at least 25,000 monthly billable contract sides in Strategy Executions) and Fee Schedule, Section I.J (Strategy Execution Fee Cap). While the reduction to the cap on Strategy Executions is available to all ATP Holders, the Exchange notes that Market Makers and Specialists have a time and place advantage by virtue of their presence on the Trading Floor to participate in such executions and therefore benefit from the reduced cap.

credits. The proposal is based on the type of business transacted on the Exchange, and Market Makers and Specialists can opt to participate in Manual transactions or not. Market Makers and Specialists who participate in the Prepayment Program will also continue to receive the same size discount on their respective rates for Manual transactions, as modified. The Exchange notes that the increased fees for Manual executions by Market Makers and Specialists, but not for other market participants, represents an equitable allocation of fees given that the proposed fees (and resulting disparity) are consistent with fees charged for Manual executions by market makers on other exchanges.<sup>18</sup> The Exchange also believes that continuing to offer Specialists lower fees than Market Makers is an equitable allocation of fees given that Specialists are subject to additional fees set forth in the Exchange's Fee Schedule.<sup>19</sup>

Moreover, even though the proposed changes increase the fees applicable to Manual transactions by Market Makers and Specialists, the Exchange does not believe they will discourage such transactions on the Exchange or the aggregation of such executions at the Exchange as a primary execution venue, including because of other reduced fees and incentives available to such participants on the Exchange.<sup>20</sup> To the extent that the proposed changes continue to attract Manual transactions to the Exchange, this order flow would continue to make the Exchange a more competitive venue for, among other things, order execution. Thus, the Exchange believes the proposed rule change would continue to improve market quality for all market participants on the Exchange and, as a consequence, continue to attract more order flow to the Exchange, thereby improving market-wide quality and price discovery.

#### The Proposed Rule Change is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory because the proposed modifications would apply to all Market Makers and Specialists who execute Manual

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<sup>18</sup> See supra notes 5 and 16.

<sup>19</sup> See supra note 6.

<sup>20</sup> See supra note 17.

transactions on the Exchange on an equal and non-discriminatory basis. In addition, all Market Makers and Specialists who are participants in the Prepayment Program will continue to receive a discount on the rates applicable to their respective Manual transactions. The proposal is based on the amount and type of business transacted on the Exchange, and Market Makers and Specialists are not obligated to participate in Manual transactions on the Exchange. Rather, the proposal is designed to continue to encourage the use of the Exchange as a primary trading venue (if they have not done so previously) by maintaining the Trading Floor for Manual transactions.

The Exchange also believes that increasing fees for Manual executions by Market Makers, but not other market participants, is not unfairly discriminatory given that the proposed rates (and resulting disparity) are a competitive response to rates charged on competing options exchanges for manual executions by market makers and because these participants may avail themselves of other reduced fees and incentives offered by the Exchange.<sup>21</sup> The Exchange also believes that it is not unfairly discriminatory to continue to offer Specialists lower fees than Market Makers given that Specialists are subject to additional fees set forth in the Exchange's Fee Schedule.<sup>22</sup>

To the extent that the proposed change assists the Exchange in continuing to attract Manual transactions to the Trading Floor, this order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would contribute to market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange, thereby improving market-wide quality and price discovery. The resulting volume and liquidity would continue to provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public

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<sup>21</sup> See supra notes 5, 16 and 17.

<sup>22</sup> See supra note 6.



interest.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would be consistent with charges for similar business at other markets. As a result, the Exchange believes that the proposed changes further the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."<sup>23</sup>

*Intramarket Competition.* The proposed change is designed to continue to promote the use of the Exchange as a primary trading venue by maintaining the Trading Floor for Manual transactions, which would enhance the quality of quoting and may increase the volumes of contracts traded on the Exchange. The Exchange believes that the proposed increased fees for Manual executions by Market Makers and Specialists but not for other market participants would not impose any burden on intermarket competition that is not necessary or appropriate because the proposed fees (and resulting disparity) are consistent with fees charged for Manual executions by market makers on other exchanges and because these participants may avail themselves of other reduced fees and incentives offered by the Exchange.<sup>24</sup> The Exchange believes that the proposed modifications to the rates applicable to Manual transactions by Market Makers and Specialists will not discourage those market participants from continuing to conduct Manual transactions on the Exchange (including because those Market Makers and Specialists who participate in the Prepayment Program will continue to receive a discounted rate on Manual

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<sup>23</sup> See Reg NMS Adopting Release, supra note 11, at 37499.

<sup>24</sup> See supra notes 5, 16 and 17.

transactions and because Specialists will continue to receive lower fees than those assessed by competing options exchanges for similar transactions). To the extent that this purpose is achieved, all of the Exchange's market participants should benefit from the continued market liquidity. Enhanced market quality and increased transaction volume that results from the increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange.

*Intermarket Competition.* The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its mechanisms and fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange currently has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.<sup>25</sup> Therefore, no exchange currently possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in March 2021, the Exchange had less than 10% market share of executed volume of multiply-listed equity and ETF options trades.<sup>26</sup>

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees to be more closely aligned with fees charged by other markets with Trading Floors for similar transactions.<sup>27</sup> The Exchange also believes that the proposed changes would continue to promote competition between the Exchange and other execution venues by encouraging orders to be sent to the Exchange for

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<sup>25</sup> See supra note 12.

<sup>26</sup> Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, see id., the Exchange's market share in multiply-listed equity and ETF options increased slightly from 7.89% for the month of March 2020 to 8.63% for the month of March 2021.

<sup>27</sup> See supra notes 5 and 16.

execution. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>28</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>29</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>30</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

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<sup>28</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>29</sup> 17 CFR 240.19b-4(f)(2).

<sup>30</sup> 15 U.S.C. 78s(b)(2)(B).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEAMER-2021-30 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAMER-2021-30. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAMER-2021-30, and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>31</sup>

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<sup>31</sup> 17 CFR 200.30-3(a)(12).

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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